IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE RESTATED TRUST OF CRYSTAL H. WEST

AMBER MILLER ADWELL, GRANT MILLER, AND GENTRY MILLER,
Petitioners/Appellees,

v.

NANCY L. MOORE,
Respondent/Appellant.

No. 2 CA-CV 2020-0003
Filed July 1, 2020

Appeal from the Superior Court in Pima County
No. PB20171469
The Honorable Kenneth Lee, Judge

VACATED

COUNSEL

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OPINION

Presiding Judge Eppich authored the opinion of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Nancy Moore challenges the trial court's award of attorney fees to Amber Miller Adwell, Grant Miller, and Gentry Miller (the Millers) from a trust established by Crystal West—Moore's aunt and the Millers' great aunt. Moore contends the court was precluded from awarding fees because the Millers had waived the claim by not including it in their petition commencing the parties' underlying lawsuit over the trust. Because we conclude that the Millers' failure to make the claim in their petition precluded the court from awarding attorney fees, we vacate the award.

Factual and Procedural Background

¶2 The following facts, primarily taken from the trial court's findings in the underlying matter, are undisputed. Crystal West, the decedent in this contested probate action, was born in 1916. For most of her life she lived in the Midwest, and after her second husband Albert retired, they moved to Arizona in the late 1990s. Albert died in 2008, and Crystal died in 2017 at the age of 100.

¶3 Decades before her death, Crystal had established a trust, which she restated in 2007 and amended several times in the following years. Crystal never had children, but she was extremely close to her sister, Velora, and the 2007 restated trust provided that if Albert did not survive Crystal, the bulk of the estate in trust would be split into two equal shares. One half was to remain in trust for Moore—Velora's daughter—paying to Moore trust income and principal as necessary in the discretion of the trustee during Moore's lifetime, with the remaining balance to be distributed on Moore's death in equal shares to Moore's daughter and in trust to Moore's special-needs son. The other half was to be split into three equal shares and distributed directly to the Millers, who are the children of Velora's son, Larry Miller. An amendment after Albert's death explicitly kept this general arrangement,[1] and it remained unchanged in the fourth amendment, dated after Velora's death in 2013, which named Grant Miller as successor trustee upon Crystal's death.

[1]This amendment provided that the trust would continue during Velora's lifetime for her benefit if she survived Crystal, but Velora died before her sister.

¶4 In August 2014, Crystal, then nearly ninety-eight years old, executed a fifth amendment, which completely cut out the Millers, distributed the bulk of the trust estate to Moore free of trust upon Crystal's death, and named Moore as successor trustee. After Crystal died, the Millers petitioned to invalidate the fifth amendment, alleging that Moore had unduly influenced Crystal to benefit herself and disinherit the Millers and her own children. After an eight-day bench trial, the trial court ruled that Moore had unduly influenced Crystal into executing the fifth amendment. The court declared the fifth amendment void and declared the fourth amended trust to be controlling.

¶5 Shortly after the ruling, the Millers applied for their attorney fees under several statutory grounds and the equitable common fund doctrine, under which a party who employs attorneys to preserve a common fund may be entitled to be reimbursed for their attorney fees from that fund. *See In re Estate of Brown*, 137 Ariz. 309, 312 (App. 1983). Moore objected, arguing that the Millers were not entitled to attorney fees because they had not requested them in their petition as required by Rule 54(g)(1), Ariz. R. Civ. P.[2] After a hearing, the court awarded the Millers their attorney fees from the trust under the common fund doctrine.

¶6 Moore timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

Discussion

¶7 Moore appeals the attorney fee award to the Millers, contending it must be vacated because the Millers failed to request the fees in their petition. We generally review a court's award of attorney fees for abuse of discretion. *King v. Titsworth*, 221 Ariz. 597, ¶ 8 (App. 2009). But the interpretation of Rule 54(g) is a question of law, which we review de novo. *Id.* When interpreting a rule of civil procedure, we seek to give effect to our supreme court's intent in promulgating the rule. *Id.* ¶ 11. "The best and most reliable indicator of the drafters' intent is the language of the rule itself." *Id.* Therefore, if a rule is clear and unambiguous, we need not look beyond its language to determine intent, and we will give the language its ordinary meaning unless doing so would cause an absurd result. *Preston v. Kindred Hosps. W., L.L.C.*, 226 Ariz. 391, ¶ 8 (2011).

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[2]The Arizona Rules of Civil Procedure apply to probate proceedings "unless they are inconsistent with the[] probate rules or A.R.S. Title 14." Ariz. R. Prob. P. 4(a)(1).

¶8 Rule 54(g)(1) provides that "[a] claim for attorney's fees must be made in the pleadings or in a Rule 12 motion filed before the movant's responsive pleading." The rule is intended to give parties notice of the risk that they may bear the burden of their opponent's legal fees, encouraging out-of-court settlement to avoid that risk. *See King*, 221 Ariz. 597, ¶¶ 13–14. The word "must" in this notice requirement is unambiguously mandatory, and we have held that our supreme court's use of such language shows its intent that trial courts award attorney fees only if a claim for fees is made as required by the rule. *See id.* ¶ 11.[3] Rule 54(i) provides two express exceptions to this rule: for fees "awarded as sanctions under a statute or rule," and when "the substantive law requires fees to be proved at trial as an element of damages." No exception is provided for attorney fees sought under the common fund doctrine specifically, nor is there a general exception for fees sought on equitable grounds.

¶9 The Millers argue nonetheless that Rule 54(g)(1) did not require them to make their equitable claim for attorney fees in their pleading. They note the rule has been amended to employ the subheading "Generally," and suggest this means that "making a claim for attorney fees in the pleadings is no longer mandatory." But in general, "headings to sections . . . are supplied for the purpose of convenient reference and do not constitute part of the law." A.R.S. § 1-212. Section headings therefore "cannot undo or limit that which the text makes plain." *Phillips v. O'Neil*, 243 Ariz. 299, ¶ 12 (2017) (quoting *Bhd. of R.R. Trainmen v. Balt. & O.R. Co.*, 331 U.S. 519, 528-29 (1947)). While headings may be a helpful tool in interpreting ambiguous language, *see id.*, the Millers do not argue that the text of Rule 54(g)(1) is ambiguous, and indeed it is not. While the subheading can be taken to suggest that there are exceptions to the provision, there is no reason to believe that it refers to any exception beyond the explicit exceptions in Rule 54(i). It does not change our conclusion that compliance with Rule 54(g)(1) is mandatory when it applies. *See King*, 221 Ariz. 597, ¶ 11.

¶10 Nor does it change our conclusion that a court may not award a party its fees when the party does not comply with Rule 54(g)(1). *See King*, 221 Ariz. 597, ¶ 15. Because the Millers did not claim their attorney fees "in the pleadings or in a Rule 12 motion filed before the movant's responsive

[3] *King* analyzed a previous version of Rule 54(g) that employed the word "shall" instead of "must." *See* 195 Ariz. XXXVIII (1999). Unless noted, this and other intervening changes in Rule 54 are immaterial to our decision.

pleading," they did not comply with the rule. Ariz. R. Civ. P. 54(g)(1). Thus, the Miller's claim for attorney fees was forfeited and the award of fees was barred.

¶11 The Millers offer several reasons why we should not strictly apply Rule 54(g)(1). First, they contend that equitable fee awards, unlike statutory fee awards, are to be considered "damages," citing *Mangiante v. Niemiec*, 910 A.2d 235, 241 (Conn. App. Ct. 2006), and they suggest that the equitable fee award here therefore falls under the exception for damages in Rule 54(i). But that exception applies only when "the substantive law requires fees to be proved at trial as an element of damages." Ariz. R. Civ. P. 54(i)(1). The Millers fail to cite any substantive law, and we are aware of none, that required the fees here to be proved at trial. Indeed, the Millers did not prove their fees at trial, but rather through a post-trial declaration submitted with an application for attorney fees—a process established within Rule 54(g) itself. *See* Ariz. R. Civ. P. 54(g)(2)–(4) (providing mandatory procedure for requesting attorney fees). Therefore, Rule 54(g)(1) applies and the exception for damages in Rule 54(i) does not.

¶12 Next, the Millers cite to the State Bar Committee Notes to the 1999 amendments to Rule 54(g), which state that "claims for attorneys' fees under A.R.S. § 12-341.01 or other similar grounds must be timely asserted in the pleadings." *See* 195 Ariz. XXXVIII (1999). They maintain that claims for attorney fees on equitable grounds are not similar to those on statutory grounds such as § 12-341.01, and argue that the bar committee's remarks therefore show there was no intent for the rule to cover equitable fee awards.

¶13 Like section headings, these "reviser's notes . . . do not constitute part of the law," § 1-212, and cannot undo or limit the unambiguous plain language of a rule, *see State v. Aguilar*, 209 Ariz. 40, ¶ 26 (2004) (rule comment may clarify ambiguous language in rule but cannot alter its clear text). The Millers concede that the attorney fee award here arose from its claim for fees, and by its terms, Rule 54(g)(1) applies without limitation to "[a] claim for attorney's fees." No exception is provided for fees claimed under the common fund doctrine or equitable grounds generally. Again, the Millers fail to point out any ambiguity in the rule that necessitates resort to extrinsic materials to assist us in construing it.

¶14 And, at any rate, nothing in the committee notes suggests to us that Rule 54(g) is intended to exclude fee awards under the common fund doctrine from the reach of Rule 54(g)(1). We are not persuaded otherwise by the out-of-state cases the Millers cite that draw distinctions

between attorney fee claims under the common fund doctrine and claims under rules or statutes such as § 12-341.01.[4] Notwithstanding any differences, these claims are similar in that a notice requirement serves the same purpose for both. The circumstances here illustrate this point. The fee award, even though it was not assessed against Moore herself, burdens her because it is funded with money she would have otherwise received from the trust. Had Moore been notified of the risk of such an award, she could have balanced her chances of winning the lawsuit against the risk of not receiving that money. That calculus may have encouraged her to settle, promoting the purpose of Rule 54(g)(1). *See King*, 221 Ariz. 597, ¶ 14. Accordingly, we reject the Millers' contention that "there is no reason or purpose to provide the opposing party with advance notice" of a common fund doctrine claim.

¶15 Next, the Millers contend they "substantially complied" with Rule 54(g)(1) via the request in their petition for "such other and further relief as the Court deems appropriate under the circumstances." They cite *Prendergast v. City of Tempe*, 143 Ariz. 14, 22 (App. 1984), to support their argument that such notice was sufficient. But in *Prendergast*, the plaintiff actually requested attorney fees in his complaint, and failed only in neglecting to cite the relevant fee statute. *Id.* at 21-22. Unlike in *Prendergast*, the Millers' generalized request here did not put Moore on notice that attorney fees would be sought. It thus did not serve the rule's purpose of encouraging Moore to settle to avoid the risk of a fee assessment. *See King*, 221 Ariz. 597, ¶ 14. Indeed, without such forewarning, as noted above, Moore was "unfairly deprived of the opportunity to 'accurately assess the risks and benefits of litigating versus settling.'" *Id.* (quoting *Robert E. Mann Constr. Co. v. Liebert Corp.*, 204 Ariz. 129, ¶ 10 (App. 2003)). In sum, the Millers' generalized request for relief did not substantially comply with Rule 54(g)(1).

¶16 Nor did the Millers provide Moore with legally sufficient notice of their claim for attorney fees via a sentence in their initial disclosure indicating they would be requesting them. The purpose of Rule 54(g)(1) "cannot be served" "[u]nless each party is on notice *before* each stage of the law suit that its opponent intends to ask for attorney[s'] fees." *Id.* (emphasis and alterations in original) (quoting *Wagenseller v. Scottsdale Mem'l Hosp.*,

[4] *See, e.g.*, *N.M. Right to Choose/NARAL v. Johnson*, 986 P.2d 450, ¶¶ 19-20 (N.M. 1999) (noting that losing litigant does not pay fee award under common fund doctrine); *Niemiec*, 910 A.2d at 241 (classifying a common fund doctrine award as damages).

147 Ariz. 370, 391 (1985)); *see Balestrieri v. Balestrieri*, 232 Ariz. 25, ¶ 11 (App. 2013) ("purpose of promoting early settlement" not served where defendant prevailed on motion to dismiss but requested fees only after prevailing on motion). Here, the Millers provided the disclosure statement to Moore only after she had likely incurred, at minimum, the expense of preparing and submitting a responsive pleading.[5] It thus fell short of providing notice at all stages of litigation that the Millers would seek fees.

¶17 The Millers point out that in *Balestrieri*, we did not strictly apply the express language of Rule 54(g)(1). *See* 232 Ariz. 25, ¶¶ 2–8. They suggest that the circumstances are similar here, and we should similarly decline to strictly apply Rule 54(g)(1)'s express language. However, the circumstances in *Balestrieri* materially differ from those here. The version of Rule 54(g)(1) in place at that time required fee requests to be made in a pleading, without any provision for fee requests in Rule 12 motions made in lieu of a pleading. *See id.* ¶ 4; 195 Ariz. XXXVIII (1999) (amending Rule 54(g)(1) to provide that claims for attorney fees "shall be made in the pleadings"). We concluded that Rule 54(g)(1) nonetheless allowed attorney fee requests in such motions, reasoning that it would make little sense to construe the rule to bar fee awards when a defending party succeeds in having a case dismissed without needing to file any responsive pleading. *See Balestrieri*, 232 Ariz. 25, ¶¶ 6-8. We also observed that construing the rule to allow such fee requests was consistent with the goal of promoting settlement. *See id.* ¶ 8.

¶18 In essence, the court in *Balestrieri* departed from the strict language of Rule 54(g) to avoid an absurd result: if the language were strictly applied, a party who prevailed on a motion to dismiss in lieu of a responsive pleading would have been denied any opportunity to claim attorney fees. In contrast to the situation in *Balestrieri*, the circumstance here that precludes the Millers from receiving attorney fees was within their control: they could have claimed the fees in their petition but did not. *Cf. Andrews v. Blake*, 205 Ariz. 236, ¶¶ 35–37 (2003) (declining to apply equity to relieve party of consequences of its neglect). Applying the rule as written imposes no more than the ordinary consequence of failing to timely

[5]The portions of the Millers' disclosure statement in the record do not reveal the date it was submitted to Moore, but initial disclosure statements generally may be submitted to an opponent up to thirty days after a responsive pleading is filed. *See* Ariz. R. Civ. P. 26.1. Moore may have incurred additional legal expenses by this time, including expenses to prepare her own disclosure statement.

assert a claim for fees: the claim is forfeited. *See, e.g.*, *Balestrieri*, 232 Ariz. 25, ¶ 11. Thus, no absurdity results from applying the rule here. *See Preston*, 226 Ariz. 391, ¶ 8.

¶19 Finally, the Millers assert that Rule 54(g), as "a procedural rule, not an equitable rule . . . . does not rob the trial court of its broad discretion to grant [the Millers] the full range of equitable relief they requested." They quote *Tom Mulcaire Contracting, LLC v. City of Cottonwood*, 227 Ariz. 533, ¶ 14 (App. 2011) (quoting *Sanders v. Folsom*, 104 Ariz. 283, 289 (1969)), for the proposition that "[e]quity is reluctant to permit a wrong to be suffered without remedy," suggesting that if the fee award is vacated here, a wrong will go without a remedy. In *Mulcaire*, the court applied equity to award attorney fees to a party where its opponent intentionally mooted a losing case to avoid an attorney fee award. *Id.* ¶¶ 13–15.[6] The court concluded that the relevant fee statute precluded the fee award, *id.* ¶¶ 6–12, but allowing the opponent to avoid a fee assessment by mooting the case would have "undercut the legislature's purpose in enacting" the relevant fee statute, *id.* ¶ 15.

¶20 In contrast, enforcing Rule 54(g) here serves its purpose of promoting settlement by requiring notice of litigation risk from fee awards. The court's award of attorney fees despite the Miller's lack of compliance with Rule 54(g) thus not only contravened the language of the rule but also its purpose. The Millers have cited no authority suggesting that the court could avoid the express language *and purpose* of the rule, and we conclude that it could not. *See Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, ¶ 14 (App. 2008) (court had no discretion to contravene express language and purpose of procedural rule); *ChartOne, Inc. v. Bernini*, 207 Ariz. 162, ¶ 24 (App. 2004) (rejecting argument that court's "'equitable powers' . . . somehow . . . permit[] them to dispense with . . . procedural rules"); *see also generally* Ariz. R. Prob. P. 1(c) (court "must enforce" rules of probate procedure), 4(a)(1) (generally incorporating civil rules into probate rules).

¶21 Moreover, *Mulcaire*, like *Balestrieri*, involved circumstances beyond the claiming party's control that unjustly barred them from receiving an attorney fee award. The circumstances here that bar the fee award, on the other hand, were within the Millers' control. In these circumstances, the trial court was required to apply Rule 54(g) and deny the

[6]The party in *Mulcaire* requested attorney fees in its initial pleading. *See* 227 Ariz. 533, ¶ 2.

Millers' their requested fees. *See King*, 221 Ariz. 597, ¶ 11; *Preston*, 226 Ariz. 391, ¶ 8; *Andrews*, 205 Ariz. 236, ¶¶ 35–37.

Disposition

¶22 We vacate the trial court's award of attorney fees to the Millers.